

Edward Waters College and Edward Waters College Chapter of the American Association of University Professors, Petitioner. Case 12-RC-7476

July 16, 1992

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in and objections to an election held December 5, 1991, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 20 for and 20 against the Petitioner, with eight challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

The Board adopts the hearing officer's recommendations concerning the Petitioner's objections¹ and the 8 challenged ballots² with the exception of the Employer's challenge to Yvonne Farina's ballot. Contrary to the hearing officer, we find for the following reasons that Farina was ineligible to vote.

The Employer (also referred to as the College) hired Farina as a full-time faculty member, a unit position, in September 1979 and awarded her tenure in July 1987.³ From May 1981 until January 1, 1990, Farina held consecutive managerial (i.e., nonunit) positions. On January 1, 1990, she began a 6-month unpaid leave of absence for health reasons which was extended to June 30, 1991.⁴

In a letter dated March 29, Farina reminded College President Mitchell that her leave would be ending soon and stated that she was interested in returning to a full-time position. Soon thereafter, President Mitchell contacted Farina and requested her participation in conducting a special internal auditing assignment that would begin April 27. Farina accepted this special assignment, which was a nonunit position. On April 27, Farina met with President Mitchell to discuss the details of the assignment. At that meeting, Farina and

Mitchell discussed her return to the College as a full-time faculty member in the fall 1991 semester.

Meanwhile, during March and April, Farina had conversations with the Business Administration Division Chairperson Mary Torian, planning for Farina's anticipated return to the College as a full-time faculty member. In May and June, Torian assigned Farina to teach four accounting courses during the fall semester.

On June 14, the special auditing assignment ended abruptly with Farina storming out of President Mitchell's office. The hearing officer found that only Farina's services with regard to the special audit assignment were terminated on June 14, and that Farina did not sever all employment ties with the College at that time.

By a certified letter dated July 22 and sent to President Mitchell, Farina reiterated that she anticipated returning to the College in the fall semester as a full-time faculty member. The College did not reply to Farina's letter, and Farina did not assume any position at the College in the fall. On two occasions during the fall semester, Farina wrote the College about her return as a full-time faculty member, but it was not until December 31, after the December 5 election, that President Mitchell responded to her letters by asking her to see him about her employment status.⁵

Citing *Red Arrow Freight Lines*, 278 NLRB 965 (1986), the hearing officer stated that the fundamental rule governing the eligibility of an employee on sick leave is that the employee is presumed to continue in that status unless and until the presumption is rebutted by an affirmative showing that the employee has resigned or has been discharged. The hearing officer found that the College presented no affirmative evidence showing Farina's resignation or discharge.

The hearing officer also examined whether Farina had a reasonable expectancy of future employment with the Employer. The hearing officer found that at the time of the election Farina had a reasonable expectation of returning to the College as a full-time faculty member. Thus, the hearing officer concluded that Farina was eligible to vote in the election and recommended that the challenge to her ballot be overruled.

In its exceptions, the Employer contends, inter alia, that the hearing officer failed to accord sufficient weight to the fact that Farina's last several positions with the College were managerial or administrative and thus outside the bargaining unit. In the Employer's view, Farina should be excluded from the unit on the ground that she is not a full-time faculty member within the meaning of the Stipulated Election Agreement.

¹ The hearing officer granted the Petitioner's motion, made at the hearing, to withdraw Objection 1.

In the absence of an exception, we adopt pro forma the hearing officer's recommendation that Petitioner's Objection 2 be overruled.

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendations regarding all the challenged ballots except the ballot of Yvonne Farina.

³ The stipulated bargaining unit is as follows:

All full time teaching faculty, librarians, and full time coaches employed by the Employer, excluding all other employees, guards, and supervisors as defined in the Act.

⁴ All subsequent dates are in 1991 unless otherwise indicated.

⁵ The hearing officer found that the December 31 letter was Farina's official termination as a tenured faculty member. Because the letter was not sent until after the election, we find it unnecessary to adopt this finding.

For the reasons set forth below, we find merit in the Employer's exceptions.

We agree with the hearing officer that the *Red Arrow* rule is relevant, even though *Red Arrow* differs from the instant case in one important respect.⁶ In *Red Arrow*, the employee in question worked in a unit position before being placed on sick leave. In the instant case, Farina worked for approximately 9 years in consecutive nonunit positions before being granted a leave of absence for health-related reasons. Nevertheless, just as an employee on sick leave from a unit position is presumed to continue in that status, so, too, do we find that an employee on sick leave from a nonunit position should be presumed to continue in that status.

The next question before us, then, is whether there is evidence in the record rebutting the presumption that Farina continued to hold a nonunit position at the time of the election and was therefore not eligible to vote. In resolving that question, we are guided by *Dayton Tire & Rubber Co.*, 206 NLRB 614, 620 (1973), which addressed a similar situation. In that case, an employee on sick leave from a unit position was held eligible to vote regardless of whether or not the employer advised him prior to voting that he would henceforth be assigned a nonunit position. The critical fact was that the employee had not actually performed any nonunit work prior to voting. Therefore, the presumption that the employee's status was that of a unit member on sick leave continued un rebutted.

Analogously, in the instant case, notwithstanding the fact that the Employer advised Farina prior to the election that she would be teaching courses during the fall semester, it is undisputed that Farina did not, in fact, assume a teaching position at the College in the fall and did not actually perform unit work at any relevant time prior to the election. Therefore, the presumption that her status was that of a nonunit member on sick leave continued un rebutted. Accordingly, Farina was not eligible to vote, and we sustain the challenge to her ballot.⁷

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this Decision and Di-

⁶ We disagree with the hearing officer's reliance on the reasonable expectation of employment test. *Red Arrow* holds that that test applies to eligibility determinations involving laid-off employees, not employees on sick leave. 278 NLRB 965 fn. 5.

The hearing officer also erred in stating that it was insignificant that Farina was on sick leave from a nonunit position. The case cited by the hearing officer, *Zartic, Inc.*, 277 NLRB 1478, 1500 (1986), does not support the hearing officer's view. In that case, the employee found eligible to vote was on sick leave from a unit position.

⁷ In agreeing with his colleagues that Farina was ineligible to vote, Member Devaney finds it unnecessary to rely on *Red Arrow Freight Lines*, 278 NLRB 965 (1986), but he nonetheless agrees that the presumption of her nonunit status has not been rebutted in this proceeding.

rection, open and count the ballots of Otis Fells, Willie McCullough, and Beverly Outler and prepare and serve the parties a revised tally of ballots. In the event that the revised tally of ballots shows that the Petitioner has received a majority of the valid votes cast, the Regional Director shall issue a certification of representative pursuant to the Board's Rules and Regulations. In the event that the revised tally of ballots shows that the Petitioner has not received a majority of the valid ballots cast, the following will be applicable.

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the Edward Waters College Chapter of the American Association of University Professors.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

IT IS FURTHER DIRECTED that the case is remanded to the Regional Director for further appropriate action.